

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

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No. 12-  
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**RECEIVED**

SEP 12 2013

**S.C. Supreme Court**

BRAD KEITH SIGMON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE  
SOUTH CAROLINA SUPREME COURT

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## QUESTIONS PRESENTED

1.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth Amendment and Fourteenth Amendment rights, for failing to object to the solicitor's closing argument, that in his personal opinion "as the solicitor of this circuit" he sought the death penalty because some people are so "mean and evil" they did not deserve to live, and that the jury should send a message that "this type of conduct will not be tolerated in Greenville County" since this argument injected an arbitrary factor into the case in violation of the Eighth and Fourteenth Amendment to the United States Constitution?

2.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendments rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when the evidence established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand?

3.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence?

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PETITION FOR WRIT OF CERTIORARI TO THE  
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Counsel for Brad Keith Sigmon petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder, and his death sentence.

**CITATION TO OPINION BELOW**

The South Carolina Supreme Court's original opinion is reported only as Brad Keith Sigmon v. State, Op. No. 27233, 2013 WL 1137371 (filed March 20, 2013). App. 1-11. Petitioner filed for rehearing on April 13, 2013. App. 12-56. The South Carolina Supreme Court denied the petition for rehearing on May 8, 2008. App. 57. That same day the Court issued its substituted opinion which is reported as Brad Keith Sigmon v. State, 403 S.C. 120, 742 S.E.2d 394 (2013). The opinion is reproduced in the appendix at pages 58-68.

## JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner is asserting the deprivation of a right secured by the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense.”

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, “Excessive bails shall not be required . . . nor cruel and unusual punishments inflicted.”

In addition, this case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, “[N]or shall any state deprive any person of life, liberty . . . without due process of law . . . .”

## STATEMENT OF THE CASE

### **Procedural history**

Petitioner Brad Keith Sigmon was indicted at the November 2001 term of the Greenville County grand jury for two counts of murder, and one count each of burglary in the first degree, grand larceny, assault and battery with intent to kill, kidnapping, and possession of a weapon during the commission of a violent crime. The state served its notice of intent to seek the death penalty. App. 2379.

Petitioner’s case was called for trial on July 18, 2002, before the Honorable Joseph J.

Watson, and a jury. App. 5. Frank Eppes, Jr. and John P. Abdalla represented petitioner. The solicitors were Robert Ariail, Betty Strom, Mindy Hervey, and Lori Reese. App. 5. Abdalla acknowledged he had never served as counsel in any capacity in a death penalty case prior to appellant's case. App. 2587, ll. 3–12. This was also the first death penalty case in any capacity for co-counsel Frank Eppes. App. 2646, ll. 4–7. Counsel Eppes recalled at his subsequent PCR deposition: “When we took the case I told Abdalla that any disagreements we had, even if he was lead counsel, that I was going to be the final word on it. And he thought I was joking. I wasn't.” App. 2646, ll. 4–16.

The state elected to proceed on the two murder indictments and the first-degree burglary indictment. The jury found appellant guilty on these counts. App. 1705, ll. 15-24.

After the twenty-four hour waiting period, the sentencing phase commenced. At the conclusion of the sentencing phase on July 21, 2002, the jury recommended death. App. 2118, ll. 9-24. Judge Watson then sentenced petitioner to death for murder, and thirty years in prison for burglary in the first degree. App. 2124, ll. 12-25.

Petitioner's convictions and sentences were affirmed on direct appeal. State v. Sigmon, 366 S.C. 552, 623 S.E.2d 648 (2005); App. 2429-2433. Rehearing was denied on January 13, 2006. This Court denied certiorari in Sigmon v. South Carolina, 548 U.S. 909 (2006).

Petitioner filed an application for post-conviction relief in the Greenville Court of Common Pleas on October 13, 2006. App. 2435-2440. An appointment hearing was held on November 6, 2006 before the Honorable J.C. Nicholson, Jr. App. 2442. Teresa Norris and William H. Ehlies, II, were appointed PCR counsel during this hearing. App. 2446, l. 13 – 2451, l. 20.

On November 15, 2006, the state filed a Return and motion to dismiss the capital PCR action. App. 2458-2476. Petitioner filed an amended application for post-conviction relief on June

4, 2008. App. 2477-2483; App. 2813-2819. Petitioner filed his trial brief on June 20, 2008. App. 2484-2499; App. 2820-2835. Petitioner then moved for summary judgment in his motion dated July 22, 2008. App. 2500-2517. The state then filed its response in opposition to the motion for summary judgment on August 5, 2008. App. 2518-2542.

The depositions of trial counsel Abdalla and Eppes were taken on June 27, 2008. App. 2580-2717. A post-conviction hearing was then convened on August 4, 2008 before the Honorable J. C. Nicholson, Jr. App. 2718. The post-conviction relief judge issued an order of dismissal dated July 14, 2009. App. 2846-2893.

Petitioner sought certiorari from the South Carolina Supreme Court on six separate issues. The state filed a return. That Court granted certiorari on three of the six issues.

The South Carolina Supreme Court affirmed Petitioner's convictions and death sentence. App. 1-11. Petitioner sought rehearing arguing, inter alia, that the Court's denial of certiorari on the issue of defense counsel's failure to object to a plethora of evidence introduced by the state during the sentencing trial about purported favorable prison conditions for inmates in South Carolina prisons was arbitrary since it had granted certiorari on that identical issue in another death penalty case, State v. John Edward Weik, Appellate Case No. #2007-060709. App. 12-59.

The South Carolina Supreme Court had previously held such prison conditions evidence introduced an impermissible arbitrary statutory circumstance into the sentencing trial. App. 12-59. Petitioner requested that the Court hold its substituted opinion in this case in abeyance pending the resolution in State v. John Edward Weik, Appellate Case No. #2007-060709. App. 29. The Court denied rehearing, and simultaneously issued its substituted opinion in State v. Brad Keith Sigmon, 403 S.C. 120, 742 S.E.2d 394 (2013) affirming Petitioner's convictions and death sentence. App. 57-68. This petition for a writ of certiorari follows.

## WHY CERTIORARI SHOULD BE GRANTED

1.

The South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth Amendment and Fourteenth Amendment rights, for failing to object to the solicitor's closing argument, which the Court held was not improper, telling the jury that in his personal opinion "as the solicitor of this circuit" that he sought the death penalty because some people are so "mean and evil" they did not deserve to live, and that the jury should send a message that "this type of conduct will not be tolerated in Greenville County." This argument injected an arbitrary factor into the case in violation of the Eighth and Fourteenth Amendment to the United States Constitution

### Relevant Facts

The South Carolina Supreme Court described some the relevant facts of how Petitioner's relationship with his live-in girlfriend ended, and his drug crazed obsession for her to reconcile ensued:

Sigmon and Rebecca "Becky" Larke were in an intimate relationship for approximately three years. They were living together in her trailer when she informed Sigmon she did not want to see him anymore. Becky's parents, Gladys and David Larke, lived next door to them in a trailer on the same property. David also informed Sigmon that Becky wanted him to move out and served him with eviction papers, stating Sigmon had to leave within two weeks. Becky subsequently moved in with her parents. Sigmon believed she had begun a new relationship and *although he pleaded with her to come back, she refused. Sigmon became increasingly obsessed with Becky, stalking her in an attempt to verify she was seeing another man.*

About a week after Becky asked him to leave, *Sigmon was drinking and smoking crack cocaine with his friend, Eugene Strube, in Becky's trailer. At some point in the evening, Sigmon decided he would go to the Larkes' home the following morning after Becky left to take her children to school and tie up Becky's parents. When*

*Becky returned home, Sigmon intended to kidnap her and disappear with her, but he did not want her parents to be able to call the authorities. Sigmon and Strube eventually ran out of crack and Strube fell asleep.*

In the morning, after they saw Becky leave, Strube and Sigmon exited the trailer. However, Strube changed his mind about helping Sigmon and left. Sigmon grabbed a baseball bat from beneath his trailer and entered the Larkes' trailer. Upon seeing Sigmon, David told his wife to bring him his gun, and Sigmon hit him in the back of the head several times with the bat. Sigmon then saw Gladys, ran after her into the living room, and hit her several times in the head. He returned to the kitchen where David lay and hit him several more times with the bat because he was still moving. He then went back to Gladys, saw that she was still moving, and hit her several more times.

App. 59-60. (emphasis added).

After Becky came home Petitioner forced her at gunpoint to go with him. She was able to “jump out of the car and tried to run away.” Petitioner shot at Becky when she ran. Becky was injured but told witnesses who came to her aid that Petitioner told her he “had either tied up or killed her parents.” Her parent’s bodies were discovered, Petitioner was captured in Tennessee and he confessed. App. 60.

During the solicitor’s closing argument at sentencing, he asserted that “the state has asked for the death penalty and we think it is appropriate in the case. He also reminded the jury that the State of South Carolina “is represented through me and my staff.” App. 2060, ll. 17 – 18; App. 2062, l. 25 – 2063, l. 7. The solicitor then argued:

Mercy is an appropriate human nature response, but mercy belongs to those who deserve it.

Now, when we asked for the death penalty, it’s a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they’re are mean and evil*

*people* who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are. And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.

App. p. 2063, l. 23 – 2064, l. 13. (emphasis added).

In addition at the conclusion of the argument, the solicitor added:

And there are people, there are people who will argue that the death penalty is not a deterrent. *But my response as the solicitor of this circuit is, it is a deterrent to this individual* and that is what we are asking, is to deter Brad Sigmon *and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

App. p. 2070, ll. 6 – 15. (emphasis added). There was no objection to this argument.

In his amended application for post-conviction relief, petitioner alleged he was denied his right to the effective assistance of counsel during the sentencing phase in violation of the Sixth and Fourteenth Amendment rights because defense counsel failed to object to the solicitor's improper closing argument above expressing his personal opinions as an elected official on why he believed the death penalty was the appropriate punishment. App. 2477 – 2479. In petitioner's PCR trial brief, he argued that the solicitor's closing argument was improper because it related the solicitor's private decision to seek the death penalty, and his personal opinion that the penalty was appropriate in this case. This argument injected an arbitrary factor in the sentencing trial in violation of South Carolina Code §16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. App. 2490 – 2491.

During counsel Abdalla's deposition, which was admitted into evidence, he testified that such a personal comment by the solicitor-- that he personally felt the death penalty was the correct

sentence-- would be improper and inadmissible. App. 2603, ll. 5 – 20; app. 2226, ll. 4-5; app. 2760, l. 6 – 2761, l. 11. Defense counsel said he hoped he knew this argument was improper during the trial but stated “I can’t remember ever knowing that.” He did acknowledge it was his responsibility to object to the argument. App. 2602, l. 12 – 2603, l. 9. Defense counsel later admitted that he did not recall if he thought the argument was improper at the time and stated “if I objected it was inappropriate. If I didn’t I either missed it or was oblivious. I don’t know. I don’t recall.” App. 2627, l. 3 – 2628, l. 17. Counsel articulated no legitimate tactical reason for failing to object to the solicitor’s improper arguments.

During the deposition counsel Eppes was asked to re-read the above argument by the solicitor. Post-conviction counsel questioned Eppes:

Q. Okay. How do you react at this date to that testimony?

A. You make me want to go look up the law and see if he can do that. My - - my thought right now would be that the solicitor cannot give them an answer of why he thinks the death penalty is appropriate in that way. I think he can argue for the death penalty and, obviously, give reasons he thinks the death penalty is appropriate as part of his argument. The death penalty is appropriate because of blah, but I’m not sure that the solicitor is allowed to give his personal opinion.

Q. How he arrived at the decision - - -

A. Yes.

Q. - - - to seek the death penalty? Would that be a fair statement?

A. I would - - - I would agree that I think - - - in looking at that right now I think that’s highly suspect.

Q. Okay. And why would it not have appeared that way to you in July of 2002?

A. I have no idea.

App. 2660, l. 19 – 2970, l. 19.

The PCR court found the argument was not improper and was “minor in comparison with the tremendous amount of evidence in aggravation . . .” App. 2878.

After granting certiorari on this issue the South Carolina Supreme Court held:

Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. Sigmon relies on Woomer in arguing that the comments were inadmissible. In Woomer, we reversed a death sentence on direct appeal where the solicitor's argument plainly attempted to minimize the jurors' sense of responsibility in choosing death. [State v.] Woomer, 277 S.C. at 175, 284 S.E.2d at 360. We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process. Specifically, he stated:

[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 175, 284 S.E.2d at 359. Unlike the statements in that case, we do not find the solicitor's comments here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in Woomer.

App. 64.

### **Discussion**

A prosecutor's argument violates due process if it “infect[s] the trial with unfairness.”

Darden v. Wainwright, 477 U.S. 168, 181(1986). State v. Woomer, 277 S.C. 170, 284 S.E.2d 357

(1991) the case the South Carolina Supreme Court sought to distinguish above, cited Gardner v.

Florida, 430 U.S. 349 (1977) and Beck v. Alabama, 447 U.S. 625 (1980), and held, “when a solicitor’s personal opinion is explicitly injected into the juror’s deliberations as though it were itself evidence justifying a sentence of death, the resulting sentence may not be free from the influence of any arbitrary factor as required by S.C. Code § 16-3-25(C)(1), and by the Eighth Amendment to the United States Constitution.” State v. Woomer, 284 S.E.2d at 359.

In Woomer, the solicitor told the jurors that he had decided to seek the death penalty against the defendant, and “so I have had to go through the same identical thing that you all do. It is not easy.” State v. Woomer, 284 S.E.2d at 359.

The argument in this case was no less prejudicial than the argument the South Carolina Supreme Court condemned in State v. Woomer.

The controlling precedent of this Court is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See Jones v. United States, 527 U.S. 373, 381 (1999) (“In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry.”); Romano v. Oklahoma, 512 U.S. 1, 7 (1994) (“States must ensure that ‘capital sentencing decisions rest on [an]individualized inquiry,’ under which the ‘character and record of the individual offender and the circumstances of the particular offense’ are considered.” (quoting McCleskey v. Kemp, 481 U.S. 279, 303 (1987))); Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (“We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is ‘appropriate[.]’”) (citing Woodson v. North Carolina, 428 U.S. 280, 305(1976)).

The solicitor’s closing argument was wholly improper because he informed them, in no

uncertain terms, that he, in his representative capacity, had “made the decision” that the death penalty was the appropriate penalty in this case. Additionally, his claim that he had discussed seeking the death penalty against a prior defendant with a juror during *voir dire*, and that *he agreed with her response* that “mean and evil people” should die, further bolstered his role as the arbiter of the appropriate sentence *in this case*. These “assurances” made by the solicitor (that as an experienced solicitor he has deemed this the appropriate sentence, and that at least one other juror in a capital case agrees that “mean and evil people” should die) diminished the jurors’ responsibility in issuing a death verdict in this case.

“A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.”

Caldwell v. Mississippi, 472 U.S.320, 332 (1985).

Taken in conjunction with the solicitor’s repeated reminders to the jurors during *voir dire* that he represented the State of South Carolina, the Solicitor’s actions amounted to an overall strategy designed to minimize the jurors’ responsibility in rendering a death verdict. See App. 255, ll. 11-13; 286, ll. 15-18 (“Mr. Childress, my name is Bob Ariail, and I’m the Solicitor for Greenville, Pickens County, which is your State’s attorney, State Prosecutor, District Attorney, whatever you call them. May call—in South Carolina we call it Solicitor.”); App. 303, ll. 18-21 (“Ms. Sullivan, my name is Bob Ariail. He just introduced us, and I will be representing the State in this case, and since—on TV they may call me the District Attorney, but State’s Prosecutor.”); App. 326, ll. 13-20 (“Mr. Sanders, my name is Bob Ariail, and I’m the Solicitor for Greenville,

Pickens Counties. That’s the person who does the prosecution of criminal cases, and in this case, or in any case in which the State seeks the death penalty, it’s my responsibility along with my staff, Ms. Strom, in the blue suit, and Ms. Hervey, one of my assistants, to represent the State in a case that we believe is appropriate for the death penalty.”); App. 395, l. 25 -396, l. 4; App. 452, ll. 11-16; App. 479, ll. 11-17; App. 508, ll. 17-23; App. 528, ll. 17-22 (“Ms. Martin, my name is Bob Ariail. I’m the Solicitor, which in South Carolina is the State’s attorney who would be representing the State seeking—in any criminal case in which the State seeks the death penalty, the Solicitor is the one responsible for bring the case to the jury.”); App. 553, ll. 14-20; App. 572, ll. 16-19; App. 593, ll. 15-18; App. 670, ll. 6-10; App. 694, ll. 1-3; App. 717, ll. 3-10; App. 742, ll. 2-7; and App. 933, ll. 4-13. The Solicitor also informed the jury that he was experienced in making these decisions, after “doing this for some 26, 27 years . . .” App. 1245, l. 18- 1246, l. 15 (“But *we know so much about it and have done it* (referring to being involved in the capital jury selection process) *so many times*, it’s hard to communicate it to somebody in a sense that you really understand it.”) (emphasis added). These statements were calculated to give the jurors confidence in the state’s decision-making regarding its decision to seek the death penalty in this particular case, and minimized the jurors’ roles in adjudicating the penalty.<sup>1</sup> See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting the Eighth Amendment’s heightened “need for reliability in the determination that

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<sup>1</sup> It is clear that this particular Solicitor is much invested in securing death verdicts, as evidenced by his request to meet with capital jurors, in an earlier case to discuss the verdict, over dinner. This was weeks after this jury did not come to a unanimous verdict with respect to the death penalty. “One juror, who attended the dinner, testified the Solicitor appeared upset with the LWOP verdict and wanted an explanation as to why the jurors had not voted for a death sentence.” State v. Inman, 395 S.C. 539, n. 10, 720 S.E.2d 31, n. 10 (2011). And see Id. n. 18 (“We will not tolerate witness intimidation from anyone, including the Solicitor’s office. Furthermore, we are deeply concerned that the Solicitor’s behavior represents a pattern of misconduct that continues to undermine our state’s system of justice. Specifically, this Court is concerned with the “win at all costs” attitude that appears to permeate the Solicitor’s office . . . we note that in the future such misconduct may result in disciplinary proceedings.”

death is the appropriate punishment in a specific case.”)

The solicitor’s argument, with its assurances the death penalty was necessitated in this case, and that he agreed with another capital juror’s belief that “mean and evil people” should die, diverted the attention of the jurors from the evidence before them to an improper consideration of the solicitor’s personal feelings, in his representative capacity, as to why he thought that petitioner deserved the death penalty. This argument was totally improper. It injected in arbitrary factors into the sentencing procedure in violation of the Eighth and the Fourteenth Amendments to the United States Constitution. See State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1983). App. 2491. Certiorari should respectfully be granted on this issue.

## WHY CERTIORARI SHOULD BE GRANTED

2.

The South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendments rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when the evidence established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand.

The evidence adduced at trial showed that petitioner was extremely intoxicated at the time of the murders. The murders of Gladys and David Larke occurred around 8:00 am on April 27th, 2001. On April 25, 2001, petitioner arrived at the home of his employee in the tree cutting business, Charles Hall, and Hall "could tell he had been drinking," though he "seemed coherent." App. 1614, ll. 22-23. Hall admitted that he later told that police that on Wednesday, April 25, 2001: "[B]rad came to work and said he had been drinking since 8:00 a.m." App. 1616, ll. 13-18.

On April 26, 2001, petitioner reported that he had used approximately fifty dollars worth of crack cocaine and drank two mixed drinks and a half-bottle of Peppermint Schnapps. App. 1981, ll. 2-20. Dr. Alex Morton, an expert in psychopharmacology and addictions, testified that petitioner's "continuing drug use" would affect his continuing "mental functioning and psychological functioning." App. 1974, ll. 11-20; app. 1981, ll. 14-20.

Around 9:00 p.m. that evening petitioner met up with Eugene Strube. "[H]e [petitioner] asked me if I wanted to go out with him, and I said, sure, and we got in my car . . ." The men bought some beer at a gas station, and brought the beer to petitioner's former home, which was next door to the victims' trailer. App. 1578, l. 1 - 1579, l. 7. In the house, according to Strube,

petitioner “drank a six-pack” of beer, and the two men smoked “a good bit of crack.” App. 1593, ll. 6 – 1694, l. 5.

While Strube got sick off “the first hit,” they each smoked “a couple hundred dollars worth” of crack, “through the evening” until they ran out. App. 1589, l. 1 - 1594, l. 5. Strube went to sleep around 1:00 a.m. while petitioner remained awake throughout the night. “I was exhausted. And he [petitioner] was strolling back and forth.” App. 1582, ll. 14-22; App. 1593, ll. 6-24.

Ultimately, that morning Strube abandoned his agreement to assist petitioner. “We got to the back of that – the other trailer, and I said, man, I can’t do this, you know, this isn’t right, and he said, good, get the hell out of here.” Strube said he “got the hell out of there,” and when he quickly left petitioner was “heading towards the other trailer,” where petitioner entered the victims’ home prior to 8:30 a.m. and the crimes ensued. App. 1582, l. 12 – 1583, l. 9.

As stated, Dr. Alexander Morton, Jr., provided testimony regarding the effects of alcohol and cocaine use at the time of the murders. His area of specialty is “drugs that affect the human brain. [He] specialize[s] specifically in substances of abuse and any psychiatric medications.” App. 1966, ll. 8 -11.

Well, his—his actions are consistent with a significant number of people that have used large amounts of cocaine, both during and after—after their use, and that is violent behavior. That is behavior that doesn’t make sense, of agitation, impulsive type behavior.

App. 1997, ll. 6-11.

The use of drugs and alcohol would certainly impair his ability to think clearly, whether he’s using at the time or going through some of the withdrawal, so it would effect his ability to make good decisions, problem solve, make sense out of his world.

App. 1998, ll. 1-5.

Q: Well, let me ask it this way. He has—do you know the facts of the case?

A: Yes, I do.

Q: All right. When Brad went in there and was hitting the Larkes with the baseball bat, you know about that?

A: Yes, I saw—I saw the crime photos of that.

Q: Eight to nine times in the head. Is there anything that is consistent there with your theories of depression or any other theories you have?

A: It's more consistent with a symptom we see with cocaine use, in that people do repetitive behaviors. From my understanding, he hit both of those people number—a number of times, more than he needed to.

Q: Right.

A: And so it's almost like once he started, he did not stop, and that is something you see with animals that are being studied with cocaine. You see it with patients that have taken too much cocaine, not violence, but I have also seen it in three patients that I've worked with that have stabbed people. They didn't stab them once or twice, but they stabbed them over 100 times. So they—once they started they did not stop.

App. 2000, 1. 16- 2001, 1. 12.

S.C. Code Ann. §16-3-20(C)(b) provides for the mitigating circumstances which may be charged to the jury if the evidence warrants. App. 69. The judge charged the following:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance; (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements was substantially impaired; and, (8) The defendant was provoked by the victim into committing the

murder. The judge *refused to charge*: (7) The age or mentality of the defendant at the time of the crime. App. 2108, ll. 10-21.

During discussion with the trial court regarding which statutory mitigating factors to charge the jury, trial counsel sought a charge on “[t]he age or mentality of the defendant at the time of the crime,” based on “testimony about his mental state.” App. 2053. See S.C. Code §16-3-20(C)(b)(7). The court determined however, that this was adequately covered by S.C. Code §16-3-20(C)(b)(6): “[T]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.”

In other words, the judge refused to provide both statutory mitigators (6) and (7) to the jury because, as he explained, “[he] always thought mentality would be like *education level, or mental retardation, or something like that.*” App. 2053, ll. 20-21. (emphasis added). Trial counsel did not correct this misapprehension of the law, nor point out that mental retardation is encompassed by a separate and distinct statutory mitigator number (10)<sup>2</sup>

MR. EPPES: His age is not a mitigating factor, Your Honor. Mentality was there because there’s been testimony about his mental state.

THE COURT: Okay. That would be covered by four. I’ve always thought mentality would be like education level, or mental retardation, or something like that.

MR. EPPES: *Yes, Your Honor, I understand. That’s fine.*

App. 2053, ll. 16-23. (emphasis added).

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<sup>2</sup> S.C. Code Ann. §16-3-20(C)(b)(10): The defendant had mental retardation at the time of the crime. “Mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. App. 69.

The trial court did not otherwise charge the jury that voluntary intoxication could be considered mitigating. *Cf. State v. Plemmons*, 296 S.C. 76, 370 S.E.2d 871 (1988). The judge charged the jury with the following mitigators:

“One, the defendant has no significant history of criminal—prior criminal convictions involving the use of violence against another person. Two, the murder was committed while the defendant was under the influence of a mental or emotional disturbance. Three, the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the requirements of law was substantially impaired. And fourth, the defendant was provoked by the victim into committing the murder. You must also consider any non-statutory mitigating circumstances.”

App. 2108, ll. 10-21.

The South Carolina Supreme Court upheld the denial of relief on this ground:

Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered the

drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

App. 66-67

### **Discussion**

The failure to give all appropriate statutory mitigating instructions violates the Eighth Amendment of the United States Constitution. See McKoy v. North Carolina, 494 U.S. 433 (1990) ("State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find, violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for a sentence less than death, even if all jurors agree that some mitigating circumstance exists, unless jurors unanimously find existence of the same mitigating circumstance.");

"Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.") Mills v. Maryland, 486 U.S. 367, 384 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Counsel rendered ineffective assistance of counsel for failing to correct the judge's *misunderstanding of the law* and obtain the instruction or, alternatively, *to preserve the issue for appeal* because evidence of voluntary intoxication requires the giving of statutory mitigating factors 2, 6, and 7. State v. Stone, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002) ("*We have specifically rejected the contention that a charge on one mitigator is sufficient to cover the*

*others.*”); (emphasis added).

Trial counsel Eppes did not offer a strategic reason for the failure to correct the judge’s misunderstanding, or otherwise preserve the issue for appellate review:

Q: Okay. All right. So, if you would accept my statement that you did, in fact, offer and request a charge on number seven, and the judge talked to you about that, and he offered to you that six embraced seven—take a look at six and tell me if you see a distinguishing feature if you—in your legal capacity?

A: Oh, yeah.

Q: Okay.

A: *I see a difference.*

Q: *Do you know why you didn’t argue with the judge about that? About there being a difference, and that you can’t agree as to his reading of the law?*

A: *I do not. . . .*

A: *I definitely see a distinction between six and seven, and I have no memory of raising Cain about it or at the time I thought it was important to raise Cain about it.*

App. 2675, l. 19 - 2676, l. 22. (emphasis added).

The other trial counsel, Abdalla, at the time of the PCR hearing, was unaware of the law regarding the submission of these statutory mitigators to the jury. App. 2604, l. 21 - 2608, l. 1.

The order of dismissal was inaccurate when it found that there was no evidence “to support an allegation of intoxication during the crime itself.” App. 2879. This finding, which was upheld by the South Carolina Supreme Court, ignored the evidence at trial that petitioner had consumed copious amounts of alcohol and cocaine right before the murders, and the expert testimony establishing that his conduct was consistent with the ingestion of cocaine. Ample evidence was adduced at trial to support the jury instruction. That petitioner was under the

influence of drugs and alcohol was significant enough to the state that it argued the jury should not consider it as an excuse for petitioner's conduct:

"There are no excuses put forward, even though Ms. Furtick and Mr. Morton tried to say there were excuses, or wanted to say there were excuses. I call that the Flip Wilson. . . . Flip's response was always, the devil made me do it. The devil made me do it. And I said that in my closing to you at the guilt phase, that somewhere along the way you were going to here (sic) somebody else was responsible. Was it going to be the cocaine? Was it going to be alcohol? . . . And it wasn't the cocaine. It wasn't the alcohol. It was a mean and evil person who committed a heinous act."

App. 2065, l. 17- 2066, l. 15.

The order denying PCR is also inaccurate when it asserts that petitioner has failed to show prejudice:

"First, that the evidence of purported drug use and alcohol use before the crime was before the jury and the jury was charged to consider his mental state. That was clearly before the jury **such that failure to charge one other rather general mitigating circumstances (sic) could not be said to have negatively affected consideration of the evidence and the other charges; and second, because of there (sic) strong evidence in aggravation, including three statutory circumstances in aggravation . . .**"

App. 2880. (emphasis added).

The order of dismissal's finding on this issue that was upheld by the South Carolina Supreme Court in this case was contrary to well-established law. See McKoy v. North Carolina, 494 U.S. 433 (1990); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). Certiorari should be granted.

## WHY CERTIORARI SHOULD BE GRANTED

3.

The South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence.

During the sentencing phase instructions to the jury, the trial court improperly diluted the significance of mitigation evidence:

"Now, a mitigating circumstance is neither a justification or an excuse for the murder. It's (sic) simply lessens the degree of one's guilt. This is it makes the defendant less blameworthy, or less culpable . . .

"So what is a non-statutory mitigating circumstance? A non-statutory mitigating circumstance is one *that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.*"

App. 2108, l. 1 - 2109, l. 10.

The trial court's penalty phase instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by petitioner by erroneously suggesting that only circumstances directly related to the offense, such as petitioner's mental status at the time of the offense, were relevant to the jury's sentencing calculus. Part of petitioner's case in mitigation concerned his adaptability to confinement, his cooperation with law enforcement, and acceptance of responsibility.

Defense counsel indeed concluded his closing argument by discussing these non-statutory mitigating circumstances:

Now, I want to stop – I want to close with two more points. And these two points are pretty simple. The first one is, Brad Sigmon is not a very bad individual. He's not a very bad prisoner. His role in life may be – well, his role in life is to end his days as a prisoner, and he is pretty accomplished at it. *He's polite. He treats the officers with respect. He's not a threat to anyone. You heard from Mr. Aiken, he's not going anywhere.* He's going to be in maximum security with the meanest, nastiest people in the State of South Carolina. He's going to be there until he draws his last breath.

The Solicitor talks about how nice the pen is. I can't talk to that. Anybody who thinks that the penitentiary is a nice place has never been there.

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Now, in closing the Solicitor wanted you to have your verdict ring like a bell. The verdict against this man who made a horrible mistake in the blink of an eye, a verdict against this man who became so caught up in this relationship, this relationship that was over, that he did the most horrible thing a man can do, he wants you to take that verdict and ring like a bell. Ring like a bell as a deterrent. Let me tell you what your verdict is going to do to deter if you vote for the death penalty. Let me tell you it's going to deter three things. *It's going to deter peaceful surrender. Brad Sigmon surrendered as peaceful as a lamb. It's going to deter confessions. He confessed three times.* And the most important thing of all, it's going to deter mothers, and families, and brothers and sisters from trying to get their relatives to turn themselves in. They sent him to the authorities, because they were concerned about him. . .

Tr. 2082, ll. 11-22; tr. 2083, l. 25 – 2084, l. 18. (emphasis added).

None of these factors concerned petitioner's blameworthiness for the offenses for which he was tried. Each factor however -- adaptability to prison, acceptance of responsibility and remorse -- were legitimate reasons not to impose the death penalty regardless of the nature of the crime.

The instruction led the jury to believe that these circumstances did not have official sanction, thereby diminishing the weight given to these factors and severely restricting any consideration of them.

The South Carolina Supreme Court held:

Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.

However, Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider: whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all . . . . In other words you may choose a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider any reason in deciding whether to sentence Sigmon to death. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not deficient for not objecting to the charge

App. 68.

### **Discussion**

In Estelle v. Williams, 425 U.S. 501, 503 (1976), this Court noted that "[t]o implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."

One of the most settled Eighth Amendment principles is that a defendant in a capital case is entitled both to present and to have considered any relevant mitigating evidence. See Lockett

v. Ohio, 438 U.S. 586 (1978); Eddings, supra, Skipper, supra; Hitchcock v. Dugger, 481 U.S. 393 (1987). Any procedure that precludes the sentencer from giving full and fair consideration to mitigating evidence creates the unacceptable risk that the death penalty will be imposed in spite of factors warranting a lesser sentence.

The trial court's instructions improperly precluded the jury from contemplating all relevant evidence to make an individualized sentencing decision. This issue was raised in petitioner's motion for summary judgment, argued in petitioner's trial brief, the order of dismissal addresses the claim on its merits, and the South Carolina Supreme Court addressed it on certiorari. App. 2511- 2513, App. 2829- 2830; App. 2881- 2882.

“Now, a mitigating circumstance is neither a justification or an excuse for the murder. It's (sic) simply lessens the degree of one's guilt. This is it makes the defendant less blameworthy, or less culpable . . .

“So what is a non-statutory mitigating circumstance? A non-statutory mitigating circumstance is one *that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.*”

App. 2108, l. 1 - 2109, l. 10. (emphasis added).

Trial counsel's failure to object to these instructions was deficient and prejudicial and was not based on any strategic consideration. Strickland v. Washington, 466 U.S. 668 (1984). Counsel did not have much appreciation for the value of statutory mitigators in a capital trial:

I really thought that the facts were the thing that was going to carry the day, not any charge that Judge Watson happened to give about mitigation.

App. 2680, ll. 17-21.

The order of dismissal, and the opinion of the South Carolina Supreme Court is inaccurate when it asserts that the instructions, taken as a whole, were sufficient. App. 2881. In

Cage v. Louisiana, 498 U.S. 39 (1990), this Court reversed the conviction, finding that a jury instruction that included the phrase “moral certainty” could allow a “reasonable juror [to] have interpreted the instruction to allow a finding of guilt on a degree of proof below that required by the due process clause.” Id. at 330. Similarly, the instruction given by the judge in this case could have allowed a “reasonable juror” to have given less consideration to the non-statutory mitigators argued by appellant which may resulted in a juror striking a different balance on the question of life in prison or death.

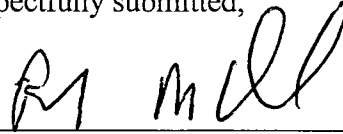
Counsel was ineffective for failing to make the objection, and the PCR court and the South Carolina Supreme Court erred by ruling the instruction that a non-statutory mitigating circumstance “is one *that is not provided for by statute, but it is one which the defendant claims serves the same purpose, that is to reduce the degree of his guilt in the offense*” was not Constitutionally objectionable because it disparaged consideration of Petitioner’s non-statutory mitigation: His acceptance of responsibility, his adaptability to confinement, and his cooperation with law enforcement. See Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 668 (1984).

Furthermore, mitigating circumstances do not actually reduce the degree of guilt. The accused has been found guilty of murder. There is no issue of lesser offenses at the sentencing hearing. Yet, a reasonable person could interpret the judge’s charge as just that, with attendant prejudice and confusion as to the office of the mitigating circumstance.

**CONCLUSION**

By reason of the foregoing arguments this Court should grant a writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

ROBERT M. DUDEK  
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ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

\_\_\_\_\_  
No. 12-  
\_\_\_\_\_

BRAD KEITH SIGMON,

Petitioner,


v.

STATE OF SOUTH CAROLINA,


Respondent

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Melody J. Brown, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 12<sup>th</sup> day of September, 2013. Counsel is also today, September 12, 2013 sending a copy of the petition for writ of certiorari and appendix to opposing counsel by electronic delivery to: [agmbrown@scag.gov](mailto:agmbrown@scag.gov).

  
\_\_\_\_\_  
ROBERT M. DUDEK  
*Counsel of Record*

SWORN TO BEFORE me this  
12<sup>th</sup> day of September, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 21, 2023.